

EXHIBIT 2

1 IN THE UNITED STATES DISTRICT FOR 09:02:56
2 THE MIDDLE DISTRICT OF TENNESSEE
3 NASHVILLE DIVISION

4 DAN MCCALEB, Executive Editor
5 of THE CENTER SQUARE,

6 Plaintiff,

7 vs. Case No. 3:22-cv-00439

8 MICHELLE LONG, in her official
9 capacity as DIRECTOR of the
10 TENNESSEE ADMINISTRATIVE OFFICE
11 OF THE COURTS,

12 Defendant.

13 Videoconference Deposition of:

14 THOMAS LANG WISEMAN

15 Taken on behalf of the Plaintiff
16 November 21, 2023

17 Commencing at 9:05 a.m. CST

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23
24 Lexitas Legal
25 Michelle Cessna, LCR, RPR
 (615)595-0073

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3 A P P E A R A N C E S
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5

6 For the Plaintiff:

7 MR. M. E. BUCK DOUGHERTY, III
8 MR. JAMES MCQUAID
9 Attorneys at Law
10 Liberty Justice Center
11 440 N. Wells Street, Suite 200
12 Chicago, IL 60654
13 (312)637-2280
14 bdougherty@libertyjusticecenter.org
15 jmcquaid@libertyjusticecenter.org

16 For the Defendant:

17 MR. MICHAEL M. STAHL
18 Attorney at Law
19 Office of the Attorney General
20 PO Box 20207
21 Nashville, TN 37202-0207
22 (615)741-3491
23 michael.stahl@ag.tn.gov

24 Also Present:

25 MS. BRIDGET CONLAN

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E X H T B T T S

S T I P U L A T I O N S

The deposition of THOMAS LANG WISEMAN was taken by counsel for the Plaintiff, whereupon all parties participated via videoconference on November 21, 2023, for all purposes under the Tennessee Rules of Civil Procedure.

All formalities as to caption, notice, statement of appearance, et cetera, are waived. All objections, except as to the form of the questions, are reserved to the hearing, and that said deposition may be read and used in evidence in said cause of action in any trial thereon or any proceeding herein.

It is agreed that MICHELLE CESSNA, LCR, RPR,
and Court Reporter for the State of Tennessee, may
swear the witness, and that the reading and signing
of the completed deposition by the witness are not
waived.

* * *

THOMAS LANG WISEMAN,

was called as a witness, and having first been duly sworn, testified as follows:

EXAMINATION

QUESTIONS BY MR. DOUGHERTY:

Q. Good morning, Mr. Wiseman.

A. Hey, how are you?

Q. I'm fine, thank you. And I guess everyone but Mr. Wiseman and I, I guess probably should -- could mute it.

But, I guess, could you please state your name for the record?

A. My full name is Thomas Lang Wiseman.

Q. And Mr. Wiseman, have you ever had your deposition taken before today?

A. I have.

Q. And can you tell me in what context and what cases, if you can recall?

A. So it's one -- it was one occasion in connection with a construction lending dispute that involved what is now First Horizon Bank and one of its lending customers. I worked on the case as a very young associate during my

1 first two or three years of practice. We -- it
2 was a workout situation. We worked with the
3 borrower to kind of maximize the value of the
4 construction contracts in order to pay down the
5 loan. Apparently, a dispute occurred later on
6 because there was some deficiencies and issues
7 came up about his cooperative -- his level of
8 cooperation, the bank's level of cooperation.
9 So I gave a deposition a number of years later
10 just about my interactions with him, limited as
11 they were. I don't really remember the
12 specifics of it other than it was based on the
13 work I did as a young lawyer.

14 Q. And you weren't actually involved as a
15 party in that case, you were an attorney?

16 A. I was an attorney, yeah.

17 Q. Have you ever been a party to a lawsuit
18 before and not in your role as an attorney?

19 A. Yes, I -- I was involved in a divorce
20 action in 2007.

21 Q. Okay. And so, that was -- was that in
22 State court in Tennessee?

23 A. State court in Tennessee and it was
24 resolved by agreement.

25 Q. Okay, what county was that in?

1 A. Shelby County.

2 Q. Okay. Are you represented by counsel
3 here today, Mr. Wiseman?

4 A. I am not.

5 Q. Okay. And do you have any medical
6 condition or anything that would prevent you
7 from your ability to give honest and truthful
8 answers today?

9 A. No.

10 Q. Okay. And --

11 A. Although I will say, I'm always amused by
12 that question because if someone were -- I'm
13 not sure they could answer the question, but
14 no.

15 Q. That's a good point, we'll take it.

16 So you -- I'm sure you probably conducted
17 depositions yourself and, you know, this is not
18 a marathon. If at any point today -- it's a
19 little bit different when we're doing it
20 remotely, but if at any time you need a break,
21 certainly feel free and we'll take a break.

22 A. Will do.

23 Q. Yeah, the only stipulation is if I've got
24 a question on the table, I would just ask that
25 you answer that particular question first

1 before we take the break. Okay?

2 A. Sounds good.

3 Q. All right. I know you've already --
4 you've been sworn in on that long remote oath,
5 but do you have any written materials that you
6 brought to the deposition today?

7 A. I brought my bag just because I didn't
8 want to leave it in the car, but it doesn't
9 have any case materials or anything. It's just
10 my bag with my pens and my computer and that
11 sort of thing.

12 Q. Okay. And we're going to talk about your
13 expert report in a second. We're going to
14 enter that into the record, and that's going to
15 be -- I'll go ahead and tell you that's going
16 to be the only exhibit we'll be discussing
17 today. Okay?

18 A. Okay.

19 Q. How did you prepare for this deposition?

20 A. I just went back and reviewed the
21 materials that were referenced in my report
22 that I prepared that -- the only thing in
23 addition to that was I scanned through the
24 deposition of Michelle Long, which I don't
25 think was available when I -- at the time I

1 prepared my report.

2 Q. And I know your report we'll talk about
3 in a second has a lot of your background. I
4 just want to go ahead and get some of the
5 background discussed and get it out of the way.

6 What is your current position?

7 A. Say again?

8 Q. What is your current work position?

9 A. I'm an attorney at Baker Donelson.

10 Q. And when did you start at Baker Donelson
11 in your current role?

12 A. So I started in my current role in
13 January of '22.

14 Q. And prior to that, what were you doing?

15 A. I worked as a deputy chief counsel to a
16 governor.

17 Q. You have your legal credentials in your
18 bio. When -- what was the date of your first
19 Bar admission?

20 A. I was admitted to the Bar in 1997. I
21 don't remember the exact month. It was -- I
22 want to say it was February or March of '97.

23 Q. And other than the state of Tennessee,
24 are you licensed to practice law in any other
25 states?

1 A. No.

2 Q. Mr. Wiseman?

3 A. I think one of us froze up there for a
4 second. I am not licensed in any state but
5 Tennessee.

6 Q. Okay. Have you ever been formally
7 disciplined by a Bar licensing authority?

8 A. I have not.

9 Q. Have you ever been convicted of a crime?

10 A. I have not.

11 Q. Now, tell me a little bit about your law
12 practice with Baker Donelson and your
13 particular practice areas, please.

14 A. It's a -- it's a fairly healthy mix of
15 things ranging from kind of traditional
16 litigation work, commercial and otherwise this
17 seems to be these days for whatever reason
18 heavy in trust and estates type litigation.

19 And then I also do a healthy amount of kind of
20 regulatory work that would be kind of state
21 facing, help people navigate kind of state
22 government issues that come up from time to
23 time. And then also assist people in the
24 economic development states who are, you know,
25 coming into the state trying to figure out how

1 to -- how to do business in Tennessee.

2 Q. Does your experience in your law practice
3 include constitutional law under the United
4 States Constitution?

5 A. I wouldn't say that I hold myself out at
6 handling constitutional questions, but
7 obviously, you know, constitutional issues come
8 up in a variety of ways in different cases.
9 So, I mean, certainly to the extent
10 constitutional questions come up, yes.

11 Q. Do you have any experience in your law
12 practice with the First Amendment?

13 A. I don't -- I don't think any direct
14 experience in my current law practice with the
15 First Amendment, no.

16 Q. Have you ever tried a case that involved
17 the First Amendment?

18 A. I don't -- I don't believe so.

19 Q. In your work with -- your past work with
20 government officials, have you ever had to
21 advise an official -- a government official
22 about what it means legally under the First
23 Amendment to have a compelling governmental
24 interest that is narrowly tailored?

25 A. I don't know that when you're in a

1 political space you use legal speak to advise
2 nonlawyer clients, but -- so I don't know that
3 I've ever used that particular phrase. But
4 certainly during the course of my time in the
5 governor's office, First Amendment related
6 issues come up from time to time.

7 Q. In your experience, what is your
8 understanding of what it -- what a compelling
9 governmental interest means under the First
10 Amendment?

11 A. What does a compelling governmental
12 interest mean under the First Amendment? I
13 think my sense is that, you know, the First
14 Amendment is a fundamental right and certainly
15 is held to the highest of scrutiny and that it
16 would require a very important governmental
17 interest in order to curve whatever First
18 Amendment right might be at issue.

19 Q. And you just kind of referenced this, the
20 scrutiny, during that experience that you've
21 had advising governmental officials, have you
22 ever had to delve into a situation on applying
23 strict scrutiny and what that means under the
24 First Amendment?

25 A. Again, you know, when you're advising

1 clients, I don't know that -- I'm not sure I
2 probably ever used that particular phrase.
3 Certainly it comes up in discussion amongst
4 your colleagues, but, I mean, we would have
5 issues come up from time to time dealing with,
6 you know, public records, open meetings and
7 other issues related to the First Amendment
8 issues that -- that people would raise or ask
9 questions about or make demands about.

10 Q. Do you personally know AOC Director
11 Michelle Long?

12 A. I know Michelle. I've served on a panel
13 with her before, but I would not say that we're
14 friends or anything -- I mean, we're
15 acquaintances, and I know who she is, yes.

16 Q. What particular panel was that?

17 A. We served on Governor Haslam's judicial
18 panel together for a brief period of time.

19 Q. And that's the only contact that you've
20 had with Ms. -- excuse me, Director Long,
21 professionally?

22 A. I think we may have talked on the phone
23 at one point when I was in the Governor's
24 office, but I don't recall the nature of the
25 call. It may have just been to congratulate

1 her when she took a position, but I don't
2 recall. I know I spoke to her at some point
3 for some reason, but I don't recall the nature
4 of it.

5 Q. What about do you personally know AOC
6 Deputy Director Rachel Harmon?

7 A. Yeah, I would say it's the same, I -- I
8 know her professionally through coordinating --
9 well, in the Governor's office coordinating
10 judicial selection issues.

11 Q. What about current AOC employee Michelle
12 Consiglio-Young, do you know her personally?

13 A. It would be the same answer, I've had
14 interaction with her professionally.

15 Q. Any opportunity that you've ever had --
16 and I don't mean casually at Bar events, but
17 have you ever worked with or advises any of the
18 current or past justices of the Tennessee
19 Supreme Court?

20 A. Just in my time only a -- on the advisory
21 commissioner rules.

22 Q. And so, you had an opportunity when you
23 -- and we'll talk about the Advisory Commission
24 in a minute. You had an opportunity to
25 interact with some of those justices?

1 A. Well, the -- I mean, the justice at the
2 time was Holly Kirby who was the liaison, so it
3 would have been her.

4 Q. Okay. But by being the liaison, Justice
5 Kirby actually attended meetings when you
6 served on the Advisory Commission?

7 A. Yes.

8 Q. Okay. All right, I'm going to go ahead
9 and we'll talk about your disclosure and your
10 report. It should be in the chat there if
11 you're able to pull that up or perhaps I don't
12 know if Mike is there with you, but the court
13 reporter can maybe help you navigate the -- the
14 exhibit.

15 A. I'm looking at the chat, but I'm not
16 seeing anything.

17 Q. So if you click on the chat, it should
18 open up a box and to the right there should be
19 a PDF.

20 A. I'm not seeing anything. It's allowing
21 me to type a message, but I'm not seeing any
22 messages.

23 MS. CONLAN: I'll send it again. It
24 might be because you joined after I sent it.

25 ///

1 BY MR. DOUGHERTY:

2 Q. All right, are you able to pull that
3 document up, Mr. Wiseman?

4 A. Yeah, it's asking me to download it. Let
5 me -- let me try to save it to the desktop and
6 see if it will...

7 Q. Yeah, however -- whatever works for you
8 just so you're able to refer to it.

9 A. Yeah, it looks like I'm going to pull it
10 up here.

11 Q. Okay.

12 A. So is there a question pending? I've got
13 it open.

14 Q. As long as you've got it open now, we can
15 talk about it.

16 A. Okay.

17 Q. So look at that document and is that your
18 signature on the -- the last page? And do you
19 recognize that document?

20 A. Yes, that is my signature and I'm
21 scanning through the document. I mean,
22 obviously, I haven't read it word for word, but
23 it looks like the document.

24 Q. And that would be your expert disclosure
25 and report?

1 A. Yes.

2 Q. For purposes of your deposition, we're
3 going to mark this as Exhibit 2. I understand
4 that it says Exhibit 1, but just because where
5 it comes in the nature of this lawsuit we're
6 going to mark it as Exhibit 2 and enter this as
7 Exhibit 2 as part of your transcript. Okay?

8 A. Okay.

9 (WHEREUPON, a document was marked as
10 Exhibit No. 2.)

11 BY MR. DOUGHERTY:

12 Q. Were you -- when you signed this
13 declaration, were you physically in the United
14 States when you signed it?

15 A. Yes.

16 Q. Do you recall what city and state you
17 were in when you signed the declaration?

18 A. I was sitting in my office in Nashville.

19 Q. Okay. And did you prepare this
20 declaration and report or did you receive
21 assistance?

22 A. I prepared it. I mean, I had discussions
23 with Mr. Stahl and Mr. Coulam, but this is my
24 work.

25 Q. Do you have multiple drafts of this

1 report or is this the only draft?

2 A. I -- it depends on what you refer to as a
3 draft. I mean, I had -- I had a working
4 document that I worked on over the course of --
5 of several days.

6 Q. What I mean --

7 A. I'm --

8 Q. I'm sorry, go ahead.

9 A. I would -- I would say it was a
10 continuous working document that -- I wouldn't
11 say I -- it was something I prepared and said,
12 hey, this is a finished draft. It was a
13 working draft throughout its entirety until I
14 finished it.

15 Q. Do you have any e-mails back and forth
16 with Mr. Stahl about this report and the draft
17 that you put together?

18 A. Yes.

19 Q. Can you please preserve those e-mailed?

20 A. Okay.

21 Q. How many do you think you have of e-mails
22 back and forth regarding this report with
23 Mr. Stahl?

24 A. Maybe two or three. I don't -- it was
25 just a handful. It was not an -- I don't

1 recall an exact number, but a handful.

2 Q. Okay. We'll go through it in general,
3 this report, and we'll go through it in detail.

4 A. Okay.

5 Q. And what is your experience with the
6 Advisory Commission on the rules of procedure
7 and practice created by TCA 16-3-601?

8 A. I was appointed I believe it was in 2015
9 initially. Don't hold me to that. I think I
10 went back and figured that out and had that in
11 the -- in my report. I trust that it's in
12 there somewhere in that general time frame.
13 And worked on the -- on the Commission for
14 maybe two or three years. At one point was
15 asked and agreed to serve as vice chair and
16 then ultimately resigned my position once I
17 agreed to accept the governor's appointment to
18 serve as deputy chief counsel to the governor.

19 Q. And we're going to talk today about the
20 Advisory Commission. We're also going to talk
21 about what I'll refer to as Federal Analogue to
22 the Advisory Commission. When I ask you a
23 question about the Advisory Commission, I'm
24 going to try to just say Advisory Commission
25 and that will be the Tennessee Commission. And

1 then when I talk about the Federal Analogue,
2 I'll try to designate that.

3 But at any point today, Mr. Wiseman, if
4 you don't understand which commission or
5 committee I'm asking you about, please let me
6 know. Okay?

7 A. Sure, okay.

8 Q. What is the purpose of the Tennessee
9 Advisory Commission?

10 A. Just to advise the Supreme Court on the
11 rules of practice and procedure.

12 Q. And aren't there basically five different
13 types of rules and practices that the Advisory
14 Commission makes recommendations on?

15 A. I don't know that I've ever stopped and
16 counted them up. I mean, the main topics of
17 conversation are always the civil rules and
18 criminal rules and rules of evidence. I don't
19 think if I -- as I sit here today I can tell
20 you exactly what the -- what the full pan of
21 play of rules were.

22 Q. Well, we'll just go through it.

23 Does the Advisory Commission make
24 recommendations regarding the Tennessee Rules
25 of Criminal Procedure?

1 A. Yes.

2 Q. Does the Advisory Commission make
3 recommendations regarding the Tennessee Rules
4 of Civil Procedure?

5 A. Yes. Let me amend my response. That was
6 the practice at the time I was on it. I don't
7 know that I can speak to what occurs today. I
8 assume that it's the same.

9 Q. Okay. Does the Advisory Commission make
10 recommendations regarding the Tennessee Rules
11 of Appellate Procedure?

12 A. Yes, as I recall.

13 Q. Does the Advisory Commission make
14 recommendations regarding the Tennessee Rules
15 of Evidence?

16 A. Yes.

17 Q. And does the Advisory Commission make
18 recommendations regarding the usual Rules of
19 Procedure?

20 A. You know, I think that's the case. I --
21 I'm racking my brain to remember whether that
22 actually occurred. I should say the Advisory
23 Commission has the ability or opportunity to
24 make recommendation. I don't know that it
25 always occurs, but yes.

1 Q. Okay. And during your time on the
2 Advisory Commission, how often did the
3 Commission meet? What was the cadence?

4 A. I want to say it was quarterly.

5 Q. Do you have any experience or knowledge
6 with the Federal Analogue to the Advisory
7 Commission, the Federal Rulemaking Committees
8 created by 28 USC 2073?

9 A. Is your question whether I have any
10 experience with it?

11 Q. Or knowledge.

12 A. I mean, I have knowledge of it. I've
13 never been on the Commission -- the Federal
14 Commission or had experience dealing with it.

15 Q. What is your knowledge of the -- the
16 Federal Committees that make rules of practice
17 and procedure?

18 A. Just, you know, general knowledge that a
19 lawyer would have in terms of understanding the
20 rules, understanding the -- you know, the
21 competence to the rules, where they originate
22 from. And then, you know, reviewing the code
23 to understand at a broad level how -- how the
24 process works.

25 Q. Have you ever had a case during your law

1 practice that involved the Federal Committee
2 created by 28 USC 2073?

3 A. Not sure I understand the question.

4 Q. Sure.

5 In your role as a practicing attorney,
6 has the Federal Advisory Committees, has that
7 ever been part of any lawsuit that you've
8 litigated?

9 A. I've never been involved in a case -- let
10 me back up. I'm not sure I understand your
11 question, so I want to answer specifically to
12 make sure I'm getting what you're saying.

13 Q. Okay.

14 A. I obviously had lots of cases that
15 involve federal practice and rules of civil
16 practice and procedure and evidence and
17 whatnot. I feel certain, although I can't
18 quote you a case where an issue would have come
19 up, where we -- where I or we at my firm would
20 have argued or made argument based on the
Advisory Commission comments. But I don't know
22 that I've ever had an issue that raised the --
23 how the -- how the Advisory Commission at the
24 federal level would have operated or -- if
25 that's -- so I'm not sure what your question

1 is, but I have to answer it like that.

2 Q. Yeah, I understand. Let me clarify that
3 some for you if I can.

4 Have you ever had any experience with the
5 federal rulemaking process that is, you know,
6 related to the statute 28 USC 2073?

7 A. No. Other than to argue the rules that
8 would have been their work product.

9 Q. What is your understanding of the Federal
10 Rulemaking Committees, what is -- what is their
11 purpose?

12 A. I don't know that I'm -- I don't know
13 that I can answer what -- what they might
14 consider their purpose to be. But, I mean,
15 the -- I think the code says what it says. The
16 notion is to have a process in place to make
17 recommendations and advise judiciary on the
18 rules.

19 Q. Okay. When were you first made aware of
20 this lawsuit, McCaleb versus Long?

21 A. Oh, two months ago. Maybe a month and a
22 half, two months.

23 Q. And how were you made aware of -- about
24 this lawsuit?

25 A. Mr. Stahl called and told me about the

1 lawsuit, kind of the general issues. We talked
2 about the issues and they asked -- or he asked
3 if they -- would I have any interest in perhaps
4 serving as an expert.

5 Q. Are you aware that there's currently a
6 preliminary injunction that is in place?

7 A. Yes.

8 Q. And did you have an opportunity before
9 you prepared your expert report to read that
10 memorandum opinion?

11 A. Yes.

12 Q. And did you also have an opportunity -- I
13 think there was a separate actual order and
14 preliminary injunction -- were you able to read
15 that?

16 A. I'm sorry?

17 Q. I think there was a separate order
18 related to the memorandum opinion about the
19 preliminary injunction. Were you able to read
20 that document?

21 A. I read the pleadings. I don't have a
22 specific recollection of reading the order, but
23 I -- I feel confident that -- that I read the
24 order.

25 Q. Okay.

1 A. Along with the memorandum of opinion.

2 Q. Okay. Did you recall who -- what
3 individuals the preliminary injunction applies
4 to?

5 A. As I sit here today, I assume that it
6 applies to the AOC as party to the case, but I
7 don't -- I need to look at the order again.

8 Q. Okay. Are there members of the judiciary
9 that serve on the Advisory Commission?

10 A. You said are there members of the
11 judiciary?

12 Q. Yes.

13 A. I don't recall as I sit here. I looked
14 at the roster of folks who are on the
15 Commission at one point, and I seem to recall
16 there were members of the judiciary. There
17 were at the time I served. Certainly not -- I
18 believe there to be today, but I -- I can't
19 quote you any.

20 Q. Are there private attorneys, what I'll
21 refer to as members of the Bar, who serve on
22 the Advisory Commission?

23 A. Yes.

24 Q. Who makes appointments to the Advisory
25 Commission?

1 A. The Supreme Court.

2 Q. And is that by statute?

3 A. Yes.

4 Q. Now, tell me again the years that you
5 served on the Advisory Commission.

6 A. I would -- in order to be specific I
7 would refer you to the information that I put
8 in my report as I -- I've said we'd go back
9 and -- and look at that, but I believe it was
10 2015 until late 2018.

11 Q. Okay. And do you recall -- during 2018
12 before you resigned, do you recall actually
13 participating in all four quarterly meetings
14 that years in 2018?

15 A. I don't have a specific recollection but
16 it would have been unusual for me to miss
17 something.

18 Q. I just didn't know if you resigned
19 midstream before all the committees had
20 actually -- I mean, excuse me, all the meetings
21 had taken place. That's kind of why I was
22 asking that about 2018.

23 Do you recall what point in 2018 you
24 resigned? Was that at the end of the year?

25 A. It would have been certainly after the

1 gubernatorial election, which would have
2 occurred in November. I believe all the
3 meetings would have been completed by then, but
4 I'm not a hundred percent certain about that.

5 Q. During your service on the Advisory
6 Commission, were any of those quarterly
7 meetings open to the public?

8 A. I don't recall a single meeting being
9 open to the public.

10 Q. I'm sorry?

11 A. I do not recall a single meeting during
12 my tenure on the Advisory Commission being open
13 to the public.

14 Q. Did the Advisory Commission meet back
15 then physically in one room, in one conference
16 room at the AOC office in Nashville?

17 A. There were multiple locations throughout
18 the state and then the locations would
19 conference in by video together.

20 Q. Where were those locations?

21 A. I think it would have been various -- my
22 recollection was it was almost always a group
23 of people in Nashville. Certainly there were a
24 group of people in Memphis where I would have
25 been located. I think there were sometimes

1 people in Knoxville and then the Tri-Cities and
2 maybe in Chattanooga depending on who was in
3 attendance and who was on the commission at
4 that time.

5 Q. In 2018 do you recall going to the AOC
6 office in Nashville during any in-person
7 quarterly meeting?

8 A. I do not have a recollection of going to
9 Nashville for a meeting.

10 Q. Okay. And so, can you describe the
11 process of the Advisory Commission and how it
12 makes rule recommendations to the Supreme
13 Court?

14 A. Well, the commission would meet, as I
15 said, quarterly. There would be -- there would
16 sometimes be proposals or suggestions made by
17 folks who perhaps were not on the commission.
18 Might be a judge or a lawyer or a member of the
19 public or whomever would submit a request or a
20 memo or letter to the Advisory Commission as an
21 IVF for a potential rule change or amendment.

22 Certainly there would be suggestions that
23 would come from the members of the Commission
24 to take a look at certain things based on
25 experiences that -- that the members may have

1 had. Or there may be issues that would be
2 raised by the Supreme Court liaison as matters
3 that the Court was interested in taking part to
4 look at.

5 It was really just kind of a large mix of
6 things. And then the Commission would -- would
7 discuss those items from time to time to the
8 extent there was, you know, broad agreement to
9 study the issue, to look at an issue. There
10 might be a -- you know, a -- a committee of
11 people assigned to look at a particular issue
12 and to, you know, kind of work on a draft of
13 some change or amendment. And then that, you
14 know, process would just repeat itself and it
15 would come before the Commission for further
16 discussion or refinement.

17 That's -- you know, and then to the
18 extent there was even broader consensus about a
19 particular amendment, then it would be
20 submitted on behalf of the Commission to the
21 Court for their review. My recollection is
22 they would have -- the Court would have their
23 general review process where they made
24 decisions about potential amendments or rules.
25 And I believe it would have been in September

1 maybe.

2 And then it would kind of go -- go to the
3 Court and it was, you know, up to them at that
4 point whether or not they agreed with any of
5 the ideas or recommendations, whether they
6 disagreed with them, whether they wanted to
7 tweak them, whether they wanted to come up with
8 their own proposals or rules. But at that
9 point it was -- you know, it was out of our
10 hands. It was certainly everyone understood it
11 was totally the discretion of the Court to do
12 as they please. And the -- our role was to
13 kind of -- kind of work on IBS and submit them
14 for whatever they were worth, if anything.

15 Q. Right. And kind of picking up on what
16 you're talking about, as I understand that --
17 and please describe what your understanding is
18 and was -- once these rule recommendations are
19 made, there's kind of after the fact there's
20 a -- there's a period where the Supreme Court
21 puts out a kind of public notice and comment
22 period that takes place after the meetings.
23 Can you describe that process?

24 A. Well, you know, as I said, the Court
25 would take, you know, the work the Commission

1 decide how they wanted to move forward. And
2 then it was their work product that would be
3 put out for public comment. Ultimately that
4 would be, you know, their decision. It was not
5 a situation where they would put out for public
6 comment all of the work the Commission and seek
7 comment, but rather what the Court felt was
8 prudent in its discretion to move forward with.

9 So certainly there would be, for example,
10 items that would be submitted by the Commission
11 the Supreme Court would decline to pursue and
12 that would not be part of the public comment
13 process.

14 Q. Was Justice Kirby the Supreme Court
15 liaison during your entire service on the
16 Advisory Commission?

17 A. I believe she was. I'm fairly confident
18 in that. It -- maybe at the margins, maybe it
19 wasn't, but I'm fairly certain it was -- that
20 she was the liaison the entire time.

21 Q. So based on what you put in your report
22 of your service period from 2015 to 2018 that
23 would be four years, by my math. So if there
24 are quarterly meetings, did you -- do you
25 recall attending 16 Advisory Commission

1 meetings during your service?

2 A. Like I said, I don't -- I don't have a
3 specific recollection or way to count whether I
4 attended every single meeting. But I -- I took
5 the work very seriously and it would have been
6 unusual for me to miss a meeting.

7 I -- I seem to recall that I may have
8 missed one meeting, maybe a summer meeting
9 because I had a vacation planned. I don't know
10 why I have that thought in my head, but I -- it
11 would have been very unusual for me to miss a
12 meeting.

13 I -- I've had very high regard for -- for
14 Justice Kirby, in particular, just because I --
15 you know, I've known her for a long time and
16 would have frankly felt it would have been rude
17 to her not to attend and I took the work
18 seriously.

19 Q. Sure. And I understand and I can
20 appreciate that.

21 And just for the record, Justice Kirby
22 became the Chief Justice of the Tennessee
23 Supreme Court, I believe, September 1st of this
24 year; is that your understanding?

25 A. I know she's is chief justice. I

1 wouldn't profess to know the exact date.

2 Q. Okay, fair enough.

3 In your service on the Advisory
4 Commission, was there ever any discussion about
5 whether meetings should be open or closed to
6 the public?

7 A. Not that I recall.

8 Q. During your service on the Advisory
9 Commission, was there ever any discussion about
10 what the Federal Analogue -- the Federal
11 Advisory Committees were doing?

12 A. Not that I recall.

13 Q. Were you aware --

14 A. Let me -- let me back up.

15 Q. Yeah, sure.

16 A. There was -- I do not recall discussion
17 of what the Federal Commission was doing in
18 terms of its operations. We would often have
19 discussions about comparisons between state and
20 federal rules and whether or not, you know, we
21 should follow suit on some Federal rule change
22 or have a discussion about the merits. That's
23 between the substance of rules, but not about
24 the operation of the Federal Commission itself.

25 Q. Was there ever any discussion that the

1 Federal Advisory Committees, their meetings
2 were open to the public?

3 A. No.

4 Q. Were you aware back then when you were
5 serving on the Tennessee Advisory Commission
6 that the Federal Advisory Commission meetings
7 were open to the public?

8 A. I don't know that -- I mean, I -- I
9 suppose I -- I knew that, but it wasn't
10 something I had conscious thought or
11 deliberation about.

12 Q. So when you saw this lawsuit and first
13 became aware of this lawsuit a couple of months
14 ago, did -- was it your understanding then a
15 couple of months ago that you knew that the
16 Federal meetings were open to the public?

17 A. I'm not sure I -- you're saying did I
18 know that before I found out about this lawsuit
19 or in connection with finding out about the
20 lawsuit?

21 Q. Both. I'm just trying to understand when
22 you first became aware consciously that the
23 Federal meetings were open to the public?

24 A. I -- I -- I knew that the Federal
25 meetings were open to the public because I knew

1 that unlike the Tennessee statutory scheme, the
2 Federal statutory scheme is much more detailed
3 and prescriptive about the role or work of that
4 commission, so yes, I was aware of that.

5 Q. And we'll talk a little bit about that
6 comparison in a moment based on your report.

7 Do you think the Tennessee Advisory
8 Commission meetings that are closed to the
9 public, in fact, serves the needs of the civil
10 litigants in the state court system?

11 MR. STAHL: Object to the form.

12 THE WITNESS: Yes.

13 BY MR. DOUGHERTY:

14 Q. And why is that?

15 A. I mean, the Advisory Commissions work --
16 serve the needs of the litigants. And the idea
17 is to -- is to -- is for continuous improvement
18 and work on the rules and to advise the Court.

19 Q. You're aware that there are a lot of,
20 say, litigants that go through the court system
21 in the state of Tennessee, aren't you?

22 MR. STAHL: Object to the form.

23 THE WITNESS: I would say as a
24 practicing lawyer I know there are lots of
25 litigants in the courts, yes.

1 BY MR. DOUGHERTY:

2 Q. Do you think it would help those pro se
3 litigants if they could see and observe the
4 rulemaking process before they actually set
5 foot in a court?

6 MR. STAHL: Object to the form.

7 THE WITNESS: I think it's impossible
8 to answer that question in a -- in a broad
9 sense. I ask that every single element -- I
10 think you could certainly make an argument that
11 in certain circumstances it might be helpful
12 for people to -- to watch a debate. I don't
13 think it would meaningfully help a litigant in
14 their -- in their work to litigate their case,
15 if that's what you're asking.

16 BY MR. DOUGHERTY:

17 Q. Well, would you agree that the First
18 Amendment attaches to the actual trial of a
19 criminal case, meaning that it must be open to
20 the public?

21 A. I think that absent compelling reasons
22 that, yes, criminal trials are open to the
23 public.

24 Q. And also the -- the voir dire process,
25 interviewing potential jurors, that process is

1 also open to the public; is that your
2 understanding?

3 A. I think with respect -- again, absent
4 compelling circumstances, I think the voir dire
5 process to the extent is oral and open court is
6 open to the public. I mean, there are
7 certain -- certain issues and avenues where,
8 you know, jury information and perhaps
9 questionnaires may or may not be open to the
10 public and depending on what you mean by that.

11 Q. Yeah, and I agree with you that when I
12 say -- I understand when you're trying to say
13 that it's subject to certain situations.

14 You would agree that there's a qualified
15 First Amendment right of access to criminal
16 trials, would you not?

17 A. Say that again? You broke up a little
18 bit.

19 Q. Yeah. Do you agree that there is a
20 qualified First Amendment right of access to
21 criminal trials?

22 A. I think I would agree with that.

23 Q. I'm sorry, you said you would agree?

24 A. I agree with that.

25 Q. And that in order to overcome that First

1 Amendment right, the government must show a
2 compelling interest that is narrowly tailored.
3 Do you agree with that?

4 MR. STAHL: Object to the form.

5 THE WITNESS: I think that any
6 litigant could avail themselves of potential
7 compelling interest to overcome the presumption
8 that a criminal trial would be open.

9 BY MR. DOUGHERTY:

10 Q. Are you aware of an incident in 2018
11 where a member of the public became verbally
12 combative with questions during a Tennessee
13 Advisory Commission that was open to the
14 public?

15 A. I'm not.

16 Q. You're not aware of that?

17 A. I do not recall that.

18 Q. Do you recall Michelle Consiglio-Young
19 serving as the AOC liaison in 2018?

20 A. I do not.

21 Q. Do you -- I think we discussed this
22 earlier. Do you -- do you know Michelle
23 Consiglio-Young?

24 A. I know her professionally.

25 Q. And tell me about that professional

1 relationship. How do you know her?

2 A. During my time in the Governor's office,
3 as you know, the Governor has the
4 constitutional duty to appoint judges when
5 there are vacancies. And that process is
6 coordinated through the AOC, and my memory is
7 that Michelle and/or Rachel Harmon were kind of
8 points of contact for that process.

9 Q. Are you aware that the justices of the
10 Tennessee Supreme Court made a decision to
11 close meetings after this 2018 incident?

12 MR. STAHL: Object to the form.

13 THE WITNESS: I'm not aware of that
14 to -- as I stated earlier, I -- I'm not aware
15 that the meetings that I attended were open to
16 the public.

17 BY MR. DOUGHERTY:

18 Q. Okay.

19 A. To say that they were closed would
20 presume that they were open, and I'm not -- I'm
21 not aware of that.

22 Q. Did you observe the June 2023 Advisory
23 Commission meeting that was open to the public
24 and livestreamed pursuant to the preliminary
25 injunction?

1 A. No.

2 Q. You didn't have an opportunity to see
3 that?

4 A. No.

5 Q. Have you spoken to anyone on the current
6 Advisory Commission as to what their thoughts
7 were about the June 2023 meeting being open?

8 A. No.

9 Q. Did we -- did we freeze up?

10 A. I can hear you. My answer was no.

11 Q. Okay. I think maybe I saw you but you
12 weren't moving.

13 Okay. And have you ever observed the
14 federal meetings that are open to the public
15 either in person or by livestreaming?

16 A. No.

17 Q. All right. I want to kind of go through
18 some of the specific paragraphs of your opinion
19 in your report. It's been marked as Exhibit 2
20 to your deposition.

21 Paragraph 6, Pages 4 through 5 of your
22 report, you state that you served as the lawyer
23 for the Governor of Tennessee; is that correct?

24 A. Yes.

25 Q. Are you claiming that there is some sort

1 of privilege that attaches to Advisory
2 Commission meetings?

3 MR. STAHL: Object to the form.

4 THE WITNESS: I don't know that I
5 would go that -- that far. That certainly was
6 not my charge, and I -- I don't profess to be a
7 lawyer making legal arguments in the case. I
8 noted that the deliberative process privilege
9 is something I routinely dealt with in the
10 Governor's office. I know that there's --
11 there's also a deliberative process privilege
12 with respect to legislative branch in that my
13 understanding is that there is a similar
14 privilege that extends likewise to the judicial
15 branch and that certainly the Advisory
16 Commission would implicate that, but I'm not
17 prepared to cite you a case or anything like
18 that to my discretion.

19 BY MR. DOUGHERTY:

20 Q. Why would the Advisory Commission
21 implicate -- excuse me, scratch that. Scratch
22 that question.

23 Why would the deliberative process
24 privilege implicate meetings that consist of
25 members of the private Bar and members of the

1 judiciary?

2 MR. STAHL: Object to the form.

3 THE WITNESS: Again, I -- I'm not a
4 lawyer on the case, so I'll defer to the
5 lawyers who are -- who are defending the case.
6 But deliberative process privilege is a concept
7 that deals with the type of advice being given,
8 not necessarily by the person giving it.

9 So the Governor's deliberative
10 process privilege, for example, runs to advice
11 that he might take from a private citizen as
12 opposed to a paid member of the staff. And
13 again, the issue is about the type of advice
14 and the candor of that the principle requires
15 to make good decisions, not necessarily on who
16 is providing that advice.

17 BY MR. DOUGHERTY:

18 Q. If Advisory Commission meetings were open
19 to the public, would the deliberative process
20 privilege be destroyed?

21 MR. STAHL: Object to the form.

22 THE WITNESS: Well, I -- I think,
23 again, I'm not prepared to argue that there
24 is -- a deliberative process privilege does
25 apply. I will defer to the lawyers on that and

1 would certainly require more research on my
2 part. I think the concepts and the principles
3 that give rise to the deliberative process
4 privilege in this particular context involving
5 the Advisory Commission would be diminished
6 certainly.

7 BY MR. DOUGHERTY:

8 Q. In Paragraph 9 you say that there are
9 other boards and commissions in Tennessee that
10 are open to the public. Why is the Advisory
11 Commission not open to the public? What makes
12 it different?

13 A. Well, you've got a couple questions baked
14 in there. Why is the Advisory Commission not
15 open to the public? Number one, it is
16 currently pursuant to the injunction. I think
17 to the extent that it was not or is not, the
18 reason is that the Supreme Court decided that
19 it would be closed.

20 Q. What's your understanding that the
21 Supreme Court made that decision and not the
22 Advisory Commission members to close meetings?

23 A. You know, I don't know the answer to
24 that, but the Advisory Commission operates in
25 service to the Supreme Court and -- and so as a

1 practical matter, the Advisory Commission works
2 at the pleasure of the Court, and I -- I would
3 not think that the Advisory Commission would
4 make a -- would make a decision that would be
5 inconsistent with the Court's wishes.

6 Q. You ever recall during your service on
7 the Commission a vote coming up as to whether
8 or not the members thought that meetings should
9 be open or closed?

10 A. No, I think as I said earlier, it was an
11 issue that -- that I -- I have no recollection
12 that it ever came up.

13 Q. In Paragraph 10 of your report, I want to
14 talk a little bit about that.

15 A. Okay.

16 Q. Is it your understanding that Advisory
17 Commission meetings are equivalent to judicial
18 deliberations of the Tennessee Supreme Court?

19 A. Well, I think it depends on what you
20 mean by deliberation. I mean, there are
21 obviously many types of judicial deliberations.
22 But certainly the Court has the authority and
23 power over rules of practice and procedure.
24 It's an inherent power of the Court. That is
25 one of the most core powers that the Court has.

1 And to the extent that the Court hears
2 advice, seeks advice, listens to advice, and
3 yes, that would be a core part of the judicial
4 power. That is a part of their deliberations.
5 By definition, the justices are the ones who
6 get together each year to make decisions about
7 the rules and what -- what amendments they may
8 want to make or not want to make or what -- you
9 know, how they want to move forward with
10 respect to the rules.

11 Q. But would you agree that any
12 deliberations that occur in meetings are
13 different than the Tennessee Supreme Court
14 deliberations on an actual case? You would
15 agree with that, right?

16 A. I'm not sure I understand the question.
17 Say that again.

18 Q. Yeah. Are Advisory Commission meeting
19 deliberations different from Tennessee Supreme
20 Court deliberations of an actual case before
21 the Court?

22 A. Sure.

23 Q. Okay.

24 A. And one involves only justices.

25 Q. I'm sorry?

1 A. I said the one involves only justices.

2 Q. And -- and it also involves a particular
3 case versus a rulemaking process like members
4 on the Commission engage in, right?

5 A. I think -- sure. I mean, I would suppose
6 that judicial deliberations of a case having
7 not been in them deal with just that case.

8 Q. And you understand from this lawsuit from
9 reading the pleadings that Dan McCaleb is not
10 trying to get access to deliberations of the
11 Tennessee Supreme Court justices on a
12 particular case? You do understand that,
13 right?

14 MR. STAHL: Object to the form.

15 THE WITNESS: I understand that that
16 is not the relief he is seeking, but I do not
17 agree that that might not be the implication of
18 his arguments in what he is seeking.

19 BY MR. DOUGHERTY:

20 Q. Do you think the public would have more
21 confidence and trust in the Tennessee court
22 system if Advisory Commission meetings were
23 open to the public?

24 MR. STAHL: Object to the form.

25 THE WITNESS: I can't speak for what

1 the public would -- would believe or not
2 believe. I can speak to what I believe.

3 BY MR. DOUGHERTY:

4 Q. Well, you're here providing an expert
5 opinion, so don't you think what the public
6 thinks and believes is important to this case?

7 A. I think with respect to what the public
8 thinks may have some bearing, but I don't -- I
9 don't believe that the public listening in to a
10 meeting has a -- a -- a meaningful impact on --
11 on the process or the public's understanding of
12 the process.

13 Q. You think the Advisory Commission would
14 make better court rule recommendations if
15 meetings were open to the public?

16 A. I do not.

17 Q. And why is that?

18 A. I think having confidential meetings
19 brings a certain level of candor to the meeting
20 that is -- is diminished by having meetings be
21 public.

22 Q. And why have the Federal Advisory
23 Committees been so successful with their
24 rulemaking when their meetings are open to the
25 public?

1 MR. STAHL: Object to the form.

2 THE WITNESS: I can't -- ask me the
3 question again. I want to make sure I
4 understand the question.

5 BY MR. DOUGHERTY:

6 Q. Yeah. Why does the Federal Advisory
7 Committees open its meetings to the public when
8 you say that open meetings of the Tennessee
9 Commission would be detrimental to the process?

10 MR. STAHL: Object to the form.

11 THE WITNESS: Well, I think the why
12 you would have to go ask the legislators in
13 congress who passed the statute requiring it as
14 to why.

15 Again, I think there are different
16 policy choices to be made. And I think there
17 could be debate or even disagreement over one
18 option versus the other. I'm -- I'm perfectly
19 open to the idea that there is a debate to be
20 had there, but it's a policy choice and the
21 federal system made that policy choice.

22 BY MR. DOUGHERTY:

23 Q. Do you think Tennessee's Advisory
24 Commission process is superior to the Federal
25 Advisory Committee rulemaking process?

1 A. I don't know that there's any objective
2 way to determine whether it's superior or not.
3 You know, obviously when you're making
4 judgments about the success of a particular
5 body, you're weighing that against outcomes
6 that did not occur by virtue of the fact that
7 you -- you can't know how something would have
8 turned out had the rules been differently.

9 But I think, again, there are
10 different -- there are different policy choices
11 to be made in this space. There are some
12 benefits and detriments to -- that attach to
13 both of those choices. But in my experience,
14 the admission -- the Advisory Commission
15 process in Tennessee has worked well, and so I
16 don't have any -- I don't have any problems
17 with it. And frankly, I think it's -- it's
18 probably better than the federal system, in my
19 judgment.

20 Q. What other Tennessee State boards and
21 commissions other than the Advisory Commission
22 work just fine with their meetings being open
23 to the public?

24 A. Say the question again.

25 Q. Yeah. Other Tennessee State boards and

1 commissions other than the Advisory Commission
2 work fine despite, you know, the public has
3 open access, they're open. Why are they okay
4 and the Advisory Commission is not?

5 A. Well, I think you need to ask the Supreme
6 Court that. Again, it's a policy choice, and I
7 think there are obviously differences in the
8 various commissions. I'm not in position to
9 tell you whether those -- those other
10 commissions work -- to your words, work fine or
11 not. I suspect that the Supreme Court must be
12 satisfied with them the way that they operate
13 if they continue to operate that way, but it's
14 ultimately up to the Court to decide.

15 Q. Are you familiar with the ADR Commission
16 in Tennessee?

17 A. Vaguely. Just by virtue and fact that
18 I'm listed as a mediator and turn in my
19 paperwork every couple years.

20 Q. What do you mean? Explain that.

21 A. I'm listed as a mediator, Rule 31
22 mediator, so you have to submit your -- not
23 sure -- your renewal of your -- your listing
24 every couple years to the ADR Commission.

25 Q. Were you aware that the ADR is made up of

1 members of the judiciary as well as private
2 attorneys?

3 A. Some vague recollection of that, but
4 I'm -- I'm not an expert on the -- on the ADR
5 Commission.

6 Q. And were you aware that the ADR
7 Commission meetings are open to the public?

8 A. I don't know that that was a working
9 understanding that I had until I -- I think I
10 saw that in a pleading or something in
11 connection with this case.

12 Q. Any --

13 A. I have no independent -- I have no
14 independent knowledge of that.

15 Q. I'm sorry, I didn't mean to interrupt.

16 A. No, I'm sorry, I think I interrupted you.

17 Q. On Page 6, Paragraph 14 of your report
18 you say that the federal rulemaking process
19 brings into effect and doesn't have
20 congressional oversight like Tennessee's
21 process. Explain -- explain how you arrived at
22 that opinion.

23 A. I'm going to ask you to reframe the
24 question. I'm not sure your question
25 accurately reflects what my opinion is, but I

1 want to make sure I heard you correctly.

2 Q. Well, I want to understand from Paragraph
3 14 in this springing into effect -- I think
4 springing into effect are your words. Can you
5 explain what you mean by the federal rulemaking
6 process springing into effect?

7 A. I think -- I think the word I used was
8 automatically goes into effect. But the
9 obvious difference between the Tennessee and
10 the federal rules is that there are different
11 default rules involved. The work of the
12 Commission in Tennessee then goes to the
13 Supreme Court who exercises complete discretion
14 over how to move forward. They then go to the
15 public comment system. They publish those
16 rules for public comment. Those rules do not
17 go into effect unless and until the general
18 assembly affirmatively approves those rules.

19 There is a -- a process. It goes before
20 the committees in the House and Senate for
21 approval and is voted on by the General
22 Assembly. And in fact, when I was in the
23 Governor's office, on one occasion the General
24 Assembly in the rush of trying to get done with
25 his work neglected to -- to approve those

1 rules. And so we had to call an extraordinary
2 session under the Tennessee Constitution to
3 have them come back in in order -- among other
4 things to approve those rules.

5 The federal system's just the opposite.
6 The federal system the work the commission by
7 and through the Court, those rules do
8 automatically go into effect without any
9 further action of congress.

10 Q. Were you aware that 28 USC 2074(a)
11 requires the US Supreme Court to transmit a
12 proposed rule to Congress no later than May 1st
13 of the year in which is the rules to go into
14 effect?

15 A. I know they transmit the rules to
16 Congress. I -- I couldn't tell you the date as
17 we sit here today, but I don't -- I don't have
18 quibble with that.

19 Q. And are you aware that 28 USC 2074(a)
20 also requires that a proposed rule not take
21 effect until December 1st of that year?

22 A. Yes.

23 Q. And doesn't 28 USC 2074(b) require
24 Congress to vote on every proposed rule before
25 it becomes effective?

1 A. I don't -- if you could flash up the --
2 I'm not prepared to quote subsections of the
3 Rules. My understanding is that Congress has
4 the option to vote up or down but their
5 affirmative approval is not required for a rule
6 that's proposed by the US Supreme Court to go
7 into effect.

8 Q. Well, you cited it, 28 USC 2074(a)6
9 [phonetic], Paragraph 14 of your complaint. So
10 I'm working off of what you cited.

11 A. Okay, but this is not a memory contest.
12 If we want to look at it, we can.

13 Q. Well, were you -- don't you understand
14 that the Federal Rules Enabling Act operates
15 just like Tennessee's where a rule doesn't go
16 into effect until Congress votes for it to go
17 into effect?

18 MR. STAHL: Object to the form,
19 argumentative.

20 THE WITNESS: That's not my
21 understanding.

22 BY MR. DOUGHERTY:

23 Q. Okay. In Paragraph 11 in your opinion
24 section, you state that no serious argument can
25 be made that the public has a right of access

1 to meetings. Do you see that in Paragraph 11?

2 A. I see Paragraph 11.

3 Q. Okay. Was Judge Richardson's memorandum
4 opinion and preliminary injunction a serious
5 argument?

6 MR. STAHL: Object to the form.

7 THE WITNESS: I think what I argued
8 is that no serious argument might be advanced.
9 For example, an absent allegation of
10 malfeasance or other wrongdoing the public
11 would have a right to access the deliberations,
12 communications or confidential exchanges
13 between a judge and her law clerk or staff or
14 between a governor and her executive team or
15 between a legislator and her staff. Period.

16 That was --

17 BY MR. DOUGHERTY:

18 Q. Did that --

19 A. That was what the no serious argument
20 might be advanced. My argument was that under
21 the circumstances, the Advisory Commission is
22 functioning different. There is no case law
23 specifically on that issue that I'm aware of,
24 so to argue my analogy that it is no different
25 is not the same thing as saying there is no

1 serious argument for that.

2 Q. But I believe you already said that the
3 meetings are different than an actual case and
4 deliberations of a judge, right?

5 A. What I said is that factually yes, there
6 is a distinction between deliberations amongst
7 judges. I do not believe there is any
8 functional equiv -- or any functional
9 difference insofar as the law should be
10 concerned.

11 Q. When you apply Richmond Newspapers
12 experience test -- and you discussed this in
13 your report -- is it your understanding that
14 Courts are to look to a similar proceeding and
15 not the exact same proceeding that is being
16 challenged?

17 A. I'm not sure I understand the question.

18 Q. Yeah. What is your understanding of the
19 Richmond Newspapers experience test?

20 A. I think the Court says to look around at
21 the various experiences in similar situations.

22 Q. Exactly. And to determine if there's
23 been a long history of a similar meeting or, I
24 suppose, to look at the exact meeting or
25 proceeding that's being challenged, right?

1 A. I mean, I don't know that I agree with
2 that. I mean, the Court was deciding the case
3 before it and that dealt with criminal trials.

4 Q. But the Court in Richmond Newspapers
5 looked at the common law heritage of criminal
6 trials being open to the public, right?

7 A. Yes, with respect to criminal trials.

8 Q. Were you aware that the Federal Analogue
9 to the Advisory Commission makes rule
10 recommendations on the Federal Rules of Civil
11 Procedure?

12 A. Yes.

13 Q. Were you aware that the Federal Analogue
14 to the Advisory Commission make rule
15 recommendations on the Federal Rules of
16 Criminal Procedure?

17 A. Yes.

18 Q. Were you aware that the Federal Analogue,
19 the Advisory Commission make rule
20 recommendations on the Federal Rules of
21 Evidence?

22 A. Yes.

23 Q. Were you aware that the Federal Analogue
24 to the Advisory Commission makes rule
25 recommendations on the Federal Rules of

1 Appellate Procedure?

2 A. Yes, I think that would be the case.

3 Q. It's -- we've been going about an hour
4 and 15 minutes. I mean, we can take a break or
5 keep going. It's your call.

6 A. I'm good.

7 Q. Okay. Did you know that these federal
8 rule recommendations are recommended to the
9 United States Supreme Court?

10 A. Yes.

11 Q. And the United States Supreme Court then
12 transmits those proposed rules to Congress for
13 a vote?

14 A. Yes. Well, they transmit them to
15 Congress.

16 Q. Does Congress not vote on them?

17 A. I think they can or can't.

18 Q. What -- what statutory provision allows
19 them to either vote or not vote?

20 A. I think the way the statute reads is that
21 they go into effect unless Congress takes
22 action otherwise. They can certainly affirm
23 them, I suppose, if they choose.

24 Q. Doesn't that sound similar to the
25 rulemaking process? I mean, with the Advisory

1 Commission?

2 A. Of course not.

3 Q. And why is that?

4 A. Well, there's a critical difference
5 between the Supreme Court exercising authority
6 which may or may not require approval or a
7 check from a legislative branch as in the
8 federal system versus the state system where
9 there is a requirement for affirmative approval
10 by the legislature before rules can go into
11 effect.

12 Q. What methodology did you use in Paragraph
13 14 arriving at your opinion that the rulemaking
14 process of the Tennessee Advisory Commission is
15 meaningful -- meaningfully different than the
16 federal related process?

17 A. What was my process?

18 Q. What methodology did you use in arriving
19 at that opinion in Paragraph 14 that
20 Tennessee's process was meaningfully different
21 than the federal process?

22 A. Like I said, conclusion I drew from
23 reading both the statute at the federal level
24 and understanding how the state system works.
25 It's meaningfully different in terms of the

1 public's representatives and/or their
2 opportunities to address ultimately whether or
3 not a rule is going to take effect or not.

4 Q. You would agree that this case involves
5 First Amendment and specifically the First
6 Amendment right of access, correct?

7 A. I think I understand, yes, that is what
8 the Plaintiff is claiming.

9 Q. Since you have no experience in the First
10 Amendment, do you think you're qualified to
11 render an expert opinion in this case?

12 A. Well, I think my opinions are related to
13 the experience that I have in connection with
14 how certain committees and commissions work, my
15 experience particularly on this Advisory
16 Commission. But to the extent you're asking
17 whether I have the expertise to tell the judge
18 what the law is, I would agree with you, I
19 don't think any expert should be dictating or
20 telling the judge what the law is. That is up
21 to the lawyers and the judge. I certainly have
22 an opinion about it, but it's ultimately the
23 judge's call.

24 Q. And your opinion is based on your service
25 on the Advisory Commission and reviewing the

1 statutes and the pleadings and the case law
2 involved in this case, right?

3 A. And my service on other boards and
4 commissions and my -- my service in state
5 government and having an understanding of the
6 different nuances of how those particular
7 things work as differentiating between one
8 another.

9 Q. Your service on the other committees and
10 commissions in Tennessee, are any of those
11 meetings open to the public?

12 A. I think certainly we have to go through
13 and list them, but the boards and commissions
14 that I've served on where -- where there's a --
15 you know, a judicatory responsibility or
16 situations where decisions are made that have
17 some binding effect, then yes, those would
18 be -- would be open meetings subject to the
19 normal qualifications that you have for open
20 meetings in connection with -- you know, you
21 may have privilege meetings to discuss legal
22 matters and those sorts of things.

23 Q. Do you recall, Mr. Wiseman, during your
24 service on the Advisory Commission if AOC had a
25 liaison that attended meetings?

1 A. I don't recall that since I was in
2 Memphis and not at the Nashville office. It
3 wouldn't have been something I -- it wouldn't
4 be somebody sitting at the table with me, so I
5 don't dispute that there was a liaison who was
6 involved in the meetings, but I -- I don't have
7 a recollection of it.

8 Q. During the preparation of your opinion
9 and report, did you ever review the AOC website
10 and past public meeting notices?

11 A. Now, I went to the website and tried to
12 look at some of that information, but the
13 website was not very helpful and I didn't make
14 it very far, to be quite candid. So I did not
15 spend a lot of time looking at that.

16 Q. Did you come across any public meeting
17 notices of past Advisory Commission meetings
18 that were open to the public?

19 A. You know, I found a few indicating when
20 the date of a meeting would be. I'm not sure I
21 would accept the characterization of them as
22 public meeting notices, but rather notices of
23 when a meeting might occur.

24 Q. Why else would the AOC issue a public
25 meeting notice to the public about an upcoming

1 meeting unless they were inviting the public?

2 A. Again --

3 MR. STAHL: Object to the form.

4 THE WITNESS: Again, I'm not sure I
5 would accept the characterization of public
6 meeting notice. But it might issue a notice of
7 when a meeting was going to occur for a couple
8 different reasons. One is to alert the
9 commission members as to when a meeting would
10 occur. And secondly to alert the public as to
11 the time frame of when they might want to
12 submit a proposal to the Commission. We used
13 to receive proposals on a regular basis.

14 Q. Well, would the AOC be in a better
15 position to talk about their public meeting
16 notices than you then, I guess, is what you're
17 saying?

18 A. I -- I would -- I would defer to the AOC
19 as to why they would have issued a notice.

20 Q. Did you notice on the website or were you
21 able to see the upcoming public meeting notice
22 for the December meeting of 2023?

23 A. I'm -- I'm sure I would have seen the
24 notice of the meeting, but I don't have a
25 specific recollection of it.

1 Q. Do you have a specific recollection of
2 seeing the June 2023 meeting, public meeting
3 notice?

4 A. I -- I think I did see that, but I don't
5 have a ready recollection of it in my -- in my
6 mind as I sit here today.

7 Q. And that June 2023 meeting, is it your
8 understanding that that was the first meeting
9 that was open to the public post preliminary
10 injunction?

11 A. I believe that to be the case only
12 because I think I read it somewhere in a -- in
13 a pleading or perhaps Mr. Bart's [sp] report.
14 I don't recall why I have that in my head,
15 but -- but I do believe that to be the case.

16 MR. DOUGHERTY: Mike, I'll go ahead
17 and pass the witness.

18 MR. STAHL: Okay.

19 Michelle, can you hear me? I muted
20 my computer to reduce some of the feedback so
21 we didn't have both speakers going at the same
22 time. Can you hear me?

23 THE REPORTER: Yeah, I can hear you.

24 ///

25 ///

1 EXAMINATION

2 QUESTIONS BY MR. STAHL:

3 Q. Mr. Wiseman, I only have a few questions.
4 You served on the Rules Committee previously;
5 is that right?

6 A. On the Rules Commission, yes.

7 Q. And while you were serving on the
8 Commission, you believe those meetings to be
9 closed; is that right?

10 A. I -- I always understood and assumed that
11 they were closed.

12 Q. If you were asked to participate as a
13 member of the Commission today knowing that the
14 meetings are now open to the public pursuant to
15 the preliminary injunction, would that affect
16 your willingness to serve on the Committee?

17 A. Perhaps. I -- I probably out of a sense
18 of duty would agree, but it would certainly
19 give me a little pause.

20 Q. Why?

21 A. Having been in the public eye, so to
22 speak, having been in state service, you always
23 have to think twice about putting yourself out
24 there for -- for matters like that. And -- and
25 certainly that's something you would think

1 about. I'm more used to it than others, I
2 suspect. There might -- others may have a more
3 strident opinion in that regard, but yeah, it
4 would -- it would -- it would affect my
5 calculus, yes.

6 Q. If you had accepted the opportunity to
7 serve on the Committee again and the member --
8 and members of the public were at the meeting,
9 would that in any way affect your -- your
10 openness, your candor or your willingness to
11 discuss issues?

12 A. I think it's certainly dependent on what
13 issues are raised. So as a general rule I
14 would say yes, certainly, you know, during my
15 time on the Commission, you know, issues
16 would -- would come up that were sensitive.
17 Some would be -- you know, my definition if
18 you're amending a rule, you're taking an issue
19 with someone's prior work and/or someone's
20 ruling with respect to prior work that needs
21 --- require some clarification. And so it can
22 be sensitive at times.

23 And so yes, I -- I think it would affect
24 the openness by which you might -- might
25 discuss certain things.

1 Q. And you've mentioned that even when the
2 meetings were closed, there were times that you
3 had received comments from the public that you
4 discussed or considered in those meetings; is
5 that right?

6 A. I don't -- I don't know that I would have
7 received -- that we would have received
8 comments. We from time to time would receive
9 rule proposals or, you know, memos from
10 attorneys or judges suggesting that we'll take
11 a look at a certain item because of some
12 experience that they had in a case. I'm -- I'm
13 loathed to try to categorize or quantify the
14 number of times that that happened, but it
15 would happen.

16 Q. If -- if the meetings were closed, did
17 you ever consider not taking in those proposed
18 rule changes from the public or consider
19 declining something that the public had
20 submitted to the Committee only because the
21 meetings were closed?

22 A. I mean --

23 MR. DOUGHERTY: Object to the form.

24 THE WITNESS: If I'm understanding
25 your question, I think every proposal that came

1 in we took very seriously and considered.

2 BY MR. STAHL:

3 Q. Despite your belief that the meetings
4 were closed to the public?

5 MR. DOUGHERTY: Object to the form.

6 THE WITNESS: You know, it's hard to
7 answer that question because I -- I've never
8 assumed otherwise. It was just something that
9 wasn't an issue as to whether they were open or
10 closed, I just always assumed that they were
11 closed and believed them to have been closed.
12 And so, it kind of fell in the category of it
13 is what it is. We consider everything very
14 seriously that would have -- that would have
15 been submitted to us.

16 Q. Okay.

17 MR. STAHL: That's all I have, Buck.

18
19 EXAMINATION

20 QUESTIONS BY MR. DOUGHERTY:

21 Q. I just have a couple more, Mr. Wiseman.

22 Did you ever feel -- did you ever feel
23 that during your attendance at meetings when
24 you were on the Advisory Commission that you
25 could not be candid with your views and how you

1 expressed them?

2 A. No, I mean, you -- certainly whenever
3 you're in a public group, you -- you want to
4 measure your words and be thoughtful. But I --
5 I don't know that I can think of an occasion
6 where I was not candid with my advice.

7 Q. So you feel that the way the meetings
8 were conducted during your service that you
9 could generate whatever ideas you felt were
10 best in advancing the process?

11 A. Again, within -- within reason. I mean,
12 certainly you always want to be thoughtful and,
13 you know, be thoughtful in your words, but I --
14 I did not feel inhibited in any way.

15 MR. DOUGHERTY: Thank you,
16 Mr. Wiseman. I have nothing further. I
17 appreciate your time taking your time out of
18 your professional career to -- to chat with us
19 this morning.

20 THE WITNESS: I appreciate it. Have
21 a happy Thanksgiving, everybody.

22 (WHEREUPON, an off-the-record
23 discussion was held.)

24 MR. DOUGHERTY: I would like to go
25 ahead and get an expedited rush transcript on

1 that electronically.

2 THE REPORTER: When do you need it?

3 (WHEREUPON, an off-the-record

4 discussion was held.)

5 MR. DOUGHERTY: Next week would be
6 great.

7 MR. STAHL: Same order, as soon as
8 you can. I know the witness would like to read
9 and sign.

10 FURTHER DEPONENT SAITH NOT

11 (Proceeding concluded at 10:31 a.m. CST)

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REPORTER'S CERTIFICATE

STATE OF TENNESSEE

COUNTY OF SUMNER

I, MICHELLE CESSNA, Licensed Court Reporter,
with offices in Nashville, Tennessee, hereby certify
that I reported the foregoing deposition of THOMAS
LANG WISEMAN by machine shorthand to the best of my
skills and abilities, and thereafter the same was
reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

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ERRATA PAGE

I, THOMAS LANG WISEMAN, having read the foregoing deposition, Pages 1 through 71, do hereby certify said testimony is a true and accurate transcript, with the following changes (if any):

PAGE **LINE** **SHOULD HAVE BEEN**

THOMAS LANG WISEMAN

Notary Public

My Commission Expires: _____

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ERRATA PAGE

I, THOMAS LANG WISEMAN, having read the foregoing deposition, Pages 1 through 71, do hereby certify said testimony is a true and accurate transcript, with the following changes (if any):

PAGE	LINE	SHOULD HAVE BEEN
9	15	Should read "deputy <i>and</i> chief counsel to the governor"
10	16	"this" should be "there"
10	24	"states" should be "space"
12	17	"curve" should be "curb"
14	21	Should read "commission <i>on the</i> rules."
19	18	Should read "deputy <i>and</i> chief counsel to the governor"
20	20-21	"pan of play" should be "panoply"
29	21	"IVF" should be "idea"
30	3	"part to" should be "a hard"
31	13	"IBS" should be "ideas"
37	9	The phrase "I ask that every single element" is obviously erroneous, but I cannot decipher from the context what the accurate phrase might have been.
42	18	The phrase "to my discretion" is obviously erroneous, but I cannot decipher from the context what the accurate phrase might have been.

THOMAS LANG WISEMAN

Notary Public

My Commission Expires:

ERRATA PAGE

I, THOMAS LANG WISEMAN, having read the foregoing deposition, Pages 1 through 71, do hereby certify said testimony is a true and accurate transcript, with the following changes (if any):

5	PAGE	LINE	SHOULD HAVE BEEN
6	50	14	"admission" should be "commission"
7	54	6	Should read "work <i>of</i> the commission"
8	56	8-9	Should read "might be advanced, for example, absent an"
9	56	19-22	Should read "That was what the "no serious argument might be advanced" comment was about. My then further argument was that under the circumstances, the Advisory Commission should functionally be no different."
10	56	24	"my" should be "by"
11	62	15	"a" should be "an"
12	67	17	"my" should be "by"
13			
14			
15			
16			
17			

THOMAS LANG WISEMAN

Notary Public

My Commission Expires: 5/9/26

